Petition

81-1127
No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

F. W. WOOLWORTH CO.,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether mere speculation (without record support) that employees may have an interest in the subject matter of a single employee's individual activity is sufficient for a determination that an individual employee, who acts alone and without the support of any other employee, has engaged in protected *concerted* activity within the meaning of Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157.

2. Whether the court of appeals, by holding that an employee may not be discharged for insubordinate misconduct in the nature of violating an announced valid rule unless the employee's misconduct is egregious, has interpreted the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.*, so as to undermine an employer's right to manage its business.

3. Whether an employer's management and free-speech rights are infringed by the holding of the court of appeals which precludes an employer from enforcing an indisputably valid rule prohibiting employee questions during a lawful employer speech unless the employer provides a "meaningful response" to prior employee inquiries.

4. Whether the court of appeals improperly applied a "balancing test" which contravenes this Court's prior decisions.

PARTIES TO THE PROCEEDING

Petitioner:
F. W. Woolworth Co.*

Respondent:
National Labor Relations Board

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* Petitioner has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
A. Facts	4
B. Board Proceedings	6
C. The Court of Appeals Decision	7
REASONS FOR GRANTING THE WRIT:	
I. There is a longstanding conflict among the circuits as to the proper standard for determining whether actions taken by an individual employee, acting alone and without the support of his co-workers, constitute concerted activity for mutual aid and protection within the purview of Section 7 of the National Labor Relations Act, which involves an important question of labor-management relations warranting review by this Court	8
II. The court of appeals holding that employers may not discipline an employee for insubordination and violation of a valid rule prohibiting employee questions during a captive audience meeting unless the employee engages in "egregious" misconduct, and unless the employer provides a "meaningful response" to employee questions, is in error and seriously impairs employer management and free-speech rights established by this Court	16

PAGE

CONCLUSION 22

APPENDIX:

A—Opinion of the United States Court of Appeals 1a

B—Decision and Order of the National Labor Relations Board 8a

C—Decision of the National Labor Relations Board's Administrative Law Judge 12a

D—Judgment of the United States Court of Appeals for the Eighth Circuit 29a

E—Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion of Rehearing *en banc* 31a

TABLE OF AUTHORITIES

PAGE

Alleluia Cushion, 221 N.L.R.B. 999 (1975) 11

Anchortank, Inc. v. NLRB, 612 F.2d 713 (6th Cir. 1979) 13

Aro, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979) 9, 13

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 18

Blaw-Knox Foundry & Mill v. NLRB, 646 F.2d 113 (4th Cir. 1981) 13

Capitol Ornamental Concrete Specialties, 248 N.L.R.B. 851 (1980) 9

Chemvet Laboratories, Inc. v. NLRB, 497 F.2d 445 (8th Cir. 1974) 11

Federal Prescription Service, Inc. v. NLRB, 496 F.2d 813 (8th Cir. 1974), *cert. denied*, 419 U.S. 1049 (1974) 21

Frank Briscoe, Inc. v. NLRB, 637 F.2d 946 (3d Cir. 1981) 13

Hotel & Restaurant Employees, Local 28, 252 N.L.R.B. No. 158 (1980) 11

Howell Metal Co., 243 N.L.R.B. 1136 (1980) 12

Hudgens v. NLRB, 424 U.S. 507 (1978) 18

Hurley Co., 130 N.L.R.B. 282 (1961) 21

Indiana Gear Works v. NLRB, 371 F.2d 273 (7th Cir. 1967) 9

Koch Supplies, Inc. v. NLRB, 646 F.2d 1257 (8th Cir. 1981) 11

Kohls v. NLRB, 629 F.2d 173 (D.C. Cir. 1980), *cert. denied*, ____ U.S. ____ , 67 L.Ed. 2d 363 (1981) 9, 14

Krispy Kreme Donut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980) 13

PAGE

Mountain Meats, 236 N.L.R.B. 1481 (1978) 21

Mushroom Transportation Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964)..... 9, 12

NLRB v. Ace Comb Co., 342 F.2d 841 (8th Cir. 1965) . 18

NLRB v. Aero Corp., 581 F.2d 511 (5th Cir. 1978), *enforcing*, 233 N.L.R.B. 401 (1977)..... 21

NLRB v. Ben Pekin Corp., 452 F.2d 205 (7th Cir. 1971) 9, 10

NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980)..... 9, 13

NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973)..... 9, 13

NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977)..... 11

NLRB v. Gissell Packing Co., 395 U.S. 575 (1969) 19

NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967)..... 9, 10

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)..... 18

NLRB v. Langenbacher Co., 398 F.2d 459 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969) 10

NLRB v. Louisiana Mfg. Co., 374 F.2d 696 (8th Cir. 1967)..... 19

NLRB v. Meinholt Mfg., Inc., 451 F.2d 737 (10th Cir. 1971)..... 14

NLRB v. Mueller Brass Co., 509 F.2d 704 (5th Cir. 1975) 18

NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971)..... 9, 12

NLRB v. Prescott Industrial Products Co., 500 F.2d 6 (8th Cir. 1971)..... 18

NLRB v. Red Top, Inc., 455 F.2d 721 (8th Cir. 1972) .. 17

PAGE

NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970) 11

NLRB v. Slotkowski Sausage Co., 620 F.2d 642 (7th Cir. 1980) 10

NLRB v. Soft Water Laundry, Inc., 346 F.2d 930 (5th Cir. 1965) 19

NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965) 17

NLRB v. United Steelworkers of America (Nutone, Inc.), 357 U.S. 357 (1958) 19, 21

Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980) 10

Peerless Plywood, 107 N.L.R.B. 427 (1953) 5

Pelton Casteel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980) 10

Peoria Plastic Co., 117 N.L.R.B. 545 (1957) 21

Randolph Div., Ethan Allen, Inc. v. NLRB, 513 F.2d 706 (1st Cir. 1975) 9, 10

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1944) 18

Roadway Express, Inc., 217 N.L.R.B. 278 (1975), *enf'd*, 532 F.2d 751 (4th Cir. 1976) 9, 13

Self Cycle & Marine Distributor Co., Inc., 237 N.L.R.B. 75 (1978) 11

Statutes Cited

National Labor Relations Act, as amended:

Section 7, 29 U.S.C. § 157 ..... *passim*

Section 8, 29 U.S.C. § 158 ..... *passim*

Section 10, 29 U.S.C. § 160 3

28 U.S.C.:

Section 1254(1) 2

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OCTOBER TERM, 1981

F. W. WOOLWORTH CO.,

Petitioner,

—VS.—

NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, F. W. Woolworth Co. [hereinafter referred to as "Woolworth"], prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in these proceedings.

Opinions Below

The Opinion of the court of appeals enforcing the Order of the National Labor Relations Board [hereinafter referred to as the "Board"] is reported at 655 F.2d 151 (8th Cir. 1981). It appears in Appendix A to this petition.

The Decision and Order of the Board affirming the decision of its Administrative Law Judge, Joel A. Harmatz [hereinafter

referred to as the "ALJ"], is reported at 251 N.L.R.B. 1111 (1980). It appears in Appendix B to this petition.

The Decision of the ALJ is reported at 251 NLRB 1112 (1980). It appears in Appendix C to this petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1981 (Appendix D). A timely petition for rehearing and suggestion of rehearing *en banc* was filed; it was denied on September 16, 1981 (Appendix E). This petition is filed within 90 days thereof.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The following sections of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, [hereinafter referred to as the "Act"] are involved in this case:

Section 7, 29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1), 29 U.S.C. § 158(a)(1):

> (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 8(c), 29 U.S.C. § 158(c):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10(c), 29 U.S.C. § 160(c):

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further

require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

STATEMENT OF THE CASE

A. Facts.

In the spring of 1979, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 771 [hereinafter referred to as the "Union"] engaged in a campaign to unionize the employees of Woolworth's Mid-Atlantic Distribution Center in Denver, Pennsylvania [hereinafter referred to as the "MADC"]. There had been two previous unsuccessful unionization attempts at the MADC since operations began there in 1975.

Pursuant to the Board's procedure, a Board-conducted election to determine the Union's representative status was sched-

uled for May 25, 1979. In order to present its views on union representation, Woolworth lawfully held a series of meetings in the MADC cafeteria during working time on May 11, 21, and 24, 1979. At each meeting, the General Manager of MADC, John Mede, delivered a noncoercive speech from a prepared text. At the first session, he lawfully announced that no questions would be entertained at the meeting but that he would be available to answer questions after the meeting (A16). This policy was continued during subsequent meetings and all but one employee—Eric Withers [hereinafter referred to as "Withers"]—complied with this valid rule (A18).

The last meeting was held on May 24, 1979, the day before the Board election. In order to comply with the Board's 24-hour rule, the speech had to be concluded by 3:00 p.m.[1] About 200 employees were present. When Mede began his speech, the lawful content of which is not contested, employee Withers interrupted by standing and saying he wanted to ask a question. Mede told him to be seated and said that he would explain the method by which he would respond to questions (A18).

Withers sat down for a few minutes, then stood again and stated, in a loud voice, that he wanted to ask a question. Mede told him he was out of order and to sit down. However, Withers defied this lawful direction, remained standing and shouted comments to Mede, including, "I see this is going to be another one of these goon sessions where you do all the talking and we do all the listening"; referred to the meeting as a one-sided affair; and accused Mede of spoon-feeding employees with lies and promises. Mede told Withers he was free to leave if he did not wish to remain, but Withers ignored this direction of his General Manager and continued to disrupt the meeting. Mede then requested assistance from Woolworth's security guard to escort Withers from the room (A19).

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1 The Board prohibits massed meetings of employees on a company's premises during working time within 24 hours of a Board representation election; it voids company victories when the rule is breached. *See, e.g., Peerless Plywood,* 107 N.L.R.B. 427 (1953).

In the meantime, Woolworth's Assistant Manager, James Ballard, approached Withers and, after several minutes, persuaded him to sit down. Yet, Withers continued to make additional comments, distracted the meeting by moving his chair, and, at the end of the speech, shouted a loud comment (A19).

Withers' effort to ask a question was not supported by any other employee. In fact, their reaction to him included profanity, "cat calls," and urgings to sit down and keep quiet (A22).

The ALJ described the situation as follows:

> Withers' insistence on asking a question was an act disobedient to both established practice and specific instructions of Mede, the highest ranking management representative headquartered in the distribution center. In this context, to quarrel with Respondent's characterization of Withers' conduct as a brazen act of insubordination, a phrase which aptly covers any refusal to yield to authority, is to deny what occurred. (A19-20)

After the meeting was over, Withers returned to his work station. He was then called to the Assistant Manager's office and told that he was suspended, pending further investigation, for his insubordination. Later that day, Woolworth sent him a mailgram advising him of his discharge, the sole reason for the discharge being his misconduct at the May 24, 1979 meeting (A19).

B. Board Proceedings.

On June 14, 1979, Withers filed an unfair labor practice charge with the Board protesting his discharge. The General Counsel of the Board issued a Complaint and Notice of Hearing on July 23, 1979, charging Woolworth with unfair labor practices under Section 8(a)(1) of the Act. A hearing before the ALJ was held on January 29 and 30, 1980.

On May 6, 1980, the ALJ issued his decision, dismissing an allegation of interrogation but sustaining the claim that Withers' discharge violated Section 8(a)(1) of the Act (A12).

Woolworth timely filed exceptions to the ALJ's decision. On August 27, 1980, a three-member panel of the Board, consisting of Members Fanning, Jenkins, and Truesdale, issued a Decision and Order affirming the rulings, findings, and conclusions of the ALJ (A1). Woolworth timely filed, in the United States Court of Appeals for the Eighth Circuit, a petition for review of the Decision and Order of the Board and the Board filed a cross-application for enforcement of its Order.

C. The Court of Appeals Decision.

In a decision filed July 31, 1981, the United States Court of Appeals for the Eighth Circuit enforced the Board's Decision and Order (A1). It held that Withers' actions during the meeting constituted "concerted activity" within the meaning of Section 7 of the Act, not on a finding of support by other employees or an actual attempt to engage the support of other employees, but on the basis of the Board's *per se* rule:

> The Board has held, and we agree, that an employee is engaged in concerted activity when he attempts to ask a question at a captive audience meeting, convened by management on the subject of unionization, unless the questions are pursuant to a scheme or plan to disrupt the meeting. (A5)

The court held that Woolworth's discharge of Withers was in violation of Section 8(a)(1) of the Act.[2] It stated that an employee who engages in misconduct during the course of

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2 Withers was not a union adherent; the ALJ specifically found that Withers had not declared his sentiment either for or against unionization (A15). Therefore, there is no issue in this case as to whether the discharge was motivated by anti-union considerations in violation of Section 8(a)(3) of the Act.

concerted activity may not be disciplined therefor unless the misconduct in question is egregious, and concluded that Withers' violation of the "no question" rule and insubordinate insistence that he be allowed to speak did not meet that standard (A6-7). The primary basis for the court of appeals' conclusion appears to be its novel and incorrect belief that Woolworth was obligated to provide a meaningful response to an employee's inquiries (A7). The Board did not base its decision on this concept and the court did not cite any authority or rationale for this newly announced principle. The court simply held that Withers had a right to receive a "meaningful response" to his inquiries, and that Woolworth's failure to provide a response acceptable to him somehow justified his insubordinate violation of the valid "no question" rule (A7).

REASONS FOR GRANTING THE WRIT

POINT I

THERE IS A LONGSTANDING CONFLICT AMONG THE CIRCUITS AS TO THE PROPER STANDARD FOR DETERMINING WHETHER ACTIONS TAKEN BY AN INDIVIDUAL EMPLOYEE, ACTING ALONE AND WITHOUT THE SUPPORT OF HIS CO-WORKERS, CONSTITUTE CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION WITHIN THE PURVIEW OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, WHICH INVOLVES AN IMPORTANT QUESTION OF LABOR-MANAGEMENT RELATIONS WARRANTING REVIEW BY THIS COURT.

The decision of the Eighth Circuit adopts a rule of "constructive concerted activity," that an individual employee, acting alone and without any ostensible aim of enlisting the support of his co-employees, may be assumed to be engaged in protected concerted activity within the meaning of Section 7 of the Act if his personal grievance may affect others. The First, Second, Fourth, and Seventh Circuits, as well as the NLRB,

have adopted this doctrine in varying forms.[3] The Third, Fifth, Sixth, Ninth, and District of Columbia Circuits have rejected it.[4] This Court has not yet addressed the question. Woolworth submits that this substantial and longstanding conflict among the circuits presents an important question of labor-management relations which warrants review and resolution by this Court.

Section 7 of the Act grants employees the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7."

By its terms, Section 7 limits its protection to actions which are both (1) concerted and (2) aimed at mutual aid and protection. Under the traditional, and still majority, rule, activity is not considered concerted unless it is engaged in by several employees or engaged in by a single employee "looking toward" or trying to induce group action. *See Mushroom Transportation Co. v. NLRB,* 330 F.2d 683 (3d Cir. 1964); *NLRB v. Buddies Supermarkets, Inc.,* 481 F.2d 714, 717 (5th Cir. 1973); *Indiana Gear Works v. NLRB,* 371 F.2d 273, 276 (7th Cir. 1967).

In recent years, however, that definition of concerted activity has been vastly—and, it is submitted, incorrectly—expanded, by use of the constructive or implied concerted activ-

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3 *See Randolph Div., Ethan Allen, Inc. v. NLRB,* 513 F.2d 706 (1st Cir. 1975); *NLRB v. Interboro Contractors, Inc.,* 388 F.2d 495 (2d Cir. 1967); *Roadway Express, Inc.,* 217 N.L.R.B. 278 (1975), *enf'd,* 532 F.2d 751 (4th Cir. 1976); *NLRB v. Ben Pekin Corp.,* 452 F.2d 205 (7th Cir. 1971); *Capitol Ornamental Concrete Specialties,* 248 N.L.R.B. 851 (1980).

4 *See NLRB v. Northern Metal Co.,* 440 F.2d 881 (3d Cir. 1971); *NLRB v. Buddies Supermarkets, Inc.,* 481 F.2d 714 (5th Cir. 1973); *Aro, Inc. v. NLRB,* 596 F.2d 713 (6th Cir. 1979); *NLRB v. Bighorn Beverage,* 614 F.2d 1238 (9th Cir. 1980); *Kohls v. NLRB,* 629 F.2d 173 (D.C. Cir. 1980), *cert. denied,* ___ U.S. ___ , 67 L.Ed.2d 363 (1981).

ity doctrine adopted by the Eighth Circuit in the case at bar. In its original and most limited form, this theory holds that individual attempts to enforce reasonable interpretations of a collective bargaining agreement are impliedly concerted. This is the position taken by the Second Circuit in *NLRB v. Langenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969),[5] and the Seventh Circuit in *NLRB v. Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971). The Seventh Circuit has, however, retreated from that decision in more recent cases. *See Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (7th Cir. 1980); *NLRB v. Slotkowski Sausage Co.*, 620 F.2d 642, 647 (7th Cir. 1980).

The First and Eighth Circuits, as well as the NLRB, have extended the concept even further, to actions not aimed at enforcing a collective bargaining agreement and, indeed, to situations where no collective bargaining agreement is in effect. In *Randolph Div., Ethan Allen, Inc. v. NLRB*, 513 F.2d 706 (1st Cir. 1975), an employee asked her supervisor for a financial statement showing the company's gains and losses, and explained that she wanted the information because of concern about the lack of a union. The First Circuit held this was protected concerted activity despite the lack of evidence to show the employee was supported by others, speaking on behalf of others, or looking to group action. It asserted that the distinction between concerted and individual action lies in the nature of the grievance—whether it may affect other employees—not in how many employees are interested, involved, or sought to be involved. "The requirement of con-

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5 The Second Circuit's decision in *Langenbacher Co., supra*, was preceded by *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967), the seminal decision on this issue. Although the court found actual concerted activity in that case, it went on to note, in *dictum*, that the employee's attempts to enforce the collective bargaining agreement might be "deemed to be for *concerted purposes* even in the absence of such interest by fellow employees." 388 F.2d at 500 (emphasis added). *Langenbacher Co., supra*, was followed by *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980), where the court refused to extend the *Interboro* doctrine to situations where, as here, a collective bargaining agreement was not involved.

certedness," the court concluded, "relates to the end, not the means." 513 F.2d at 708. The Board applies the same standard: all individual actions which might later effect benefit to others are considered implicitly concerted. *See Alleluia Cushion,* 221 N.L.R.B. 999 (1975). *See also Self Cycle & Marine Distributor Co., Inc.,* 237 N.L.R.B. 75 (1978); *Hotel & Restaurant Employees, Local 28,* 252 N.L.R.B. 158 (1980).

The decision of the court of appeals herein adopts a similarly expansive rule.[6] Although the ALJ, the Board, and the Eighth Circuit all found that employee Withers was engaged in protected concerted activity, there was never any finding that he was acting in concert with other employees, supported by other employees, or even attempting to induce other employees to join him.[7]

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6 The Eighth Circuit had already addressed the question of constructive concerted activity in several prior cases. In *NLRB v. Selwyn Shoe Mfg. Corp.,* 428 F.2d 217, 221 (8th Cir. 1970), it held that individual attempts to enforce a collective bargaining agreement are implicitly concerted. But, in *Koch Supplies, Inc. v. NLRB,* 646 F.2d 1257 (8th Cir. 1981), it held that individual complaints about vacation pay were not concerted; the basis of that ruling, however, is unclear. Although it found that no group action was discussed or contemplated (suggesting a requirement of actual concerted activity), it also stated that "if the employee's efforts are intended to gain more favorable contract terms for himself or herself, then there is some element of collective activity or contemplation thereof, and the employees' efforts are protected." It would thus appear that the panel deciding that case followed the rule of the Second Circuit, accepting the doctrine of constructive concerted activity, but only in the context of enforcement of a collective bargaining agreement. Yet, in the case at bar, a different panel has taken a contrary approach, thus further indicating a need for resolution of the issue by this Court. *See also Chemvet Laboratories, Inc. v. NLRB,* 497 F.2d 445, 451-52 (8th Cir. 1974) (employee complaining of discriminatory working conditions not engaged in concerted activity because not supported by anyone else); *NLRB v. Dawson Cabinet Co.,* 566 F.2d 1079 (1977) (employee complaints of unequal pay not concerted because employee acting alone and not pursuant to collective bargaining agreement).

7 Quite to the contrary, the ALJ found that Withers was acting alone and that not "a single employee supported Withers' effort that led to his discharge"; indeed, the ALJ found that Withers' fellow employees reacted to his comments with "cat calls" and urgings to sit down (A22).

The individuality of Withers' actions, however, was implicitly deemed insignificant by the court of appeals and the Board. The ALJ based his finding of concerted activity solely on the fact that the acts in question occurred during a captive audience meeting, citing the Board's decision in *Howell Metal Co.*, 243 N.L.R.B. 1136 (1980), for the proposition that any and all *individual* actions during such meetings constitute concerted activity: "The misconduct in issue here arose in a context, which under established Board policy, constituted activity protected by Section 7 of the Act." The Board adopted the ALJ's decision without discussion, and the Eighth Circuit enforced, specifically accepting the constructive concerted activity doctrine:

> The Board has held, and we agree, that an employee is engaged in concerted activity when he attempts to ask questions at a captive audience meeting, convened by management on the subject of unionization, unless the questions are pursuant to a scheme or plan to disrupt the meeting. *See Howell Metal Co.*, 243 N.L.R.B. 1136, 102 L.R.R.M. 1031 (1980).

The error in the reasoning which underlies the "constructive concerted activity" doctrine is well illustrated by the Third Circuit's total rejection of that concept in *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971). The Board had held in that case that a probationary employee demanding that he be given holiday pay was engaged in concerted activity because his grievance was presented within the framework of a collective bargaining agreement and could affect the rights of other employees in the unit. The Third Circuit reversed, rejecting the concept of constructive concerted activity as a "legal fiction." It stated that its holding in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 638 (3d Cir. 1964), had already stretched the common meaning of "concerted" by including within its purview individual acts aimed at producing group action.[8] To

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8 The court stated as follows: "Webster's New International Dictionary (2d ed. 1947) defines 'concert' as 'agreement in a design or

stretch that definition further to include activity which may be considered "concerted" only in a "fictional sense," it concluded, would not serve the purposes of the Act. 440 F.2d at 884. *Accord Frank Briscoe Inc. v. NLRB,* 637 F.2d 946 (3d Cir. 1981).

The Fifth Circuit followed this reasoning in *NLRB v. Buddies Supermarkets, Inc.,* 481 F.2d 714 (5th Cir. 1973),[9] as did the Sixth Circuit in *Aro, Inc. v. NLRB,* 596 F.2d 713, 717 (6th Cir. 1979):

> [F]or individual action to be deemed concerted action it must be shown that the individual in fact was acting as a representative of other employees rather than acting for the benefit of other employees only in a theoretical sense.

The District of Columbia and Ninth Circuits have not yet decided whether concerted activity may be implied with respect to attempts to enforce collective bargaining agreements, but both have rejected such implication in all other circumstances.[10] In *NLRB v. Bighorn Beverage,* 614 F.2d 1238 (9th Cir. 1980), the Ninth Circuit refused to enforce the Board's rule that the individual filing of a safety complaint is always concerted, describing the implied concerted action theory as "a

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plan; union formed by mutual communication of opinions and views; accordance in a scheme; harmony; simultaneous action' and 'concerted' as 'mutually contrived or planned; agreed on.' " 440 F.2d at 884.

9 "We are pursuaded by the reasoning in *Northern Metal,* however, that a statutory basis for the concerted activity rule announced in *Interboro* is questionable and hence we decline to follow that decision." 481 F.2d at 719. *Accord Anchortank, Inc. v. NLRB,* 612 F.2d 1153, 1160-61 (5th Cir. 1980).

10 The Fourth Circuit decisions in *Blaw-Knox Foundry & Mill v. NLRB,* 646 F.2d 113 (4th Cir. 1981) and *Krispy Kreme Donut Corp. v. NLRB,* 635 F.2d 304 (4th Cir. 1980) are to the same effect. They are, however, inconsistent with that court's enforcement of the Board's order in *Roadway Express, Inc.,* 217 N.L.R.B. 278 (1975), *enf'd,* 532 F.2d 751 (4th Cir. 1976).

legal fiction presenting an unwarranted expansion of concerted action unsupported by a statutory basis." 614 F.2d at 1242. The District of Columbia Circuit noted similarly in *Kohls v. NLRB,* 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied,* ____ U.S. ____ , 67 L.Ed. 2d 363 (1981):

> Given the rather clear language of sections 7 and 8(a)(1) of the NLRA, we have serious doubts about the validity of the *Interboro* doctrine. As was noted by the Third Circuit in *Northern Metal, supra,* the rationale supporting the doctrine is suspect; *Interboro* creates a legal fiction of *constructive* concerted activity in the face of statutory language that plainly protects workers who '*engage* in concerted activity' for the mutual aid and protection of other workers.

See also NLRB v. Meinholdt Mfg. Inc., 451 F.2d 737, 739 (10th Cir. 1971).

Woolworth submits that the above cases rejecting the "constructive concerted activity" doctrine are correct, for they are supported by both the language and policy objectives of the Act. The clear and unambiguous language of Section 7 limits protection to activities which are *both* concerted and aimed at mutual aid and protection; but the constructive concerted activity doctrine effectively eliminates the first of these requirements. By inferring that individual actions are concerted merely because thay may affect others, the doctrine rewrites the statute to extend protection to any and all individual acts merely because they may later result in mutual aid and protection.

The potential impact of this doctrine on labor-management relations is apparent and extreme. Although the question of concerted activity arose in this case in the context of employee questions at a captive audience meeting, the doctrine of constructive concerted activity adopted by the Eighth Circuit is not so limited. Since virtually all individual employee protests or complaints have the potential to affect others in some

manner and at some time, individual employees would be able—if the decision and reasoning of the Eighth Circuit herein are permitted to stand—to engage in purely personal campaigns to protest their wages, work assignments, management directives, and all other terms and conditions of employment with virtual impunity. Woolworth submits this is neither an intended nor a reasonable interpretation of Section 7.

In sum, there is clear and substantial conflict among the circuits as to the propriety of the concept of "constructive concerted activity." Some circuits hold it exists and must always be applied; some hold it may sometimes be applied; and others simply reject it. Until this conflict is resolved, employers will continue to face daily confusion and uncertainty as to what individual actions by their employees are concerted and, therefore, protected under the Act and which are not. They will remain unable to determine with certainty whether an individual employee who berates management, walks off the job, refuses to follow instructions, or in any other way protests the terms and conditions of his employment is engaged in protected concerted activity or individual and unprotected griping. Rational decisions with respect to employee discipline simply cannot be made in this context.

For these reasons, Woolworth respectfully submits that this Court should grant its petition for *certiorari* for the purpose of resolving the conflict as to whether "concerted activity" must be actual or may be implied.

POINT II

THE COURT OF APPEALS HOLDING THAT EMPLOYERS MAY NOT DISCIPLINE AN EMPLOYEE FOR INSUBORDINATION AND VIOLATION OF A VALID RULE PROHIBITING EMPLOYEE QUESTIONS DURING A CAPTIVE AUDIENCE MEETING UNLESS THE EMPLOYEE ENGAGES IN "EGREGIOUS" MISCONDUCT, AND UNLESS THE EMPLOYER PROVIDES A "MEANINGFUL RESPONSE" TO EMPLOYEE QUESTIONS, IS IN ERROR AND SERIOUSLY IMPAIRS EMPLOYER MANAGEMENT AND FREE-SPEECH RIGHTS ESTABLISHED BY THIS COURT.

The court of appeals decision holds that an employer may not impose discipline for violation of a lawful rule prohibiting employee questions during a lawful captive audience speech unless the employee conduct in question is egregious. Woolworth submits that this ruling is a radical departure from law established in prior decisions of this Court; that it significantly curtails the management and free-speech rights of employers and alters the balance of union-management power.

The circumstances of the discharge at issue herein were never seriously in dispute. During the course of a union campaign, Woolworth held a series of lawful employee meetings during working time. At the first meeting, it was lawfully announced that no questions would be taken during the course of the meetings, but that the speaker would be available for such after each session.[11] At the final meeting, employee Withers repeatedly and intentionally violated the "no question" rule in a rude and insubordinate manner,[12] and he was later suspended and ultimately discharged as a result thereof.

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11 It was never alleged that the employees were not allowed sufficient alternative outlets for exercise of their Section 7 rights; indeed, the Board never made any such finding. The court of appeals raised the issue on its own.

12 As might be anticipated, there was some dispute as to the degree of Withers' misconduct, but the ALJ described it as follows: "Withers' insistence on asking a question was an act disobedient both to es-

Despite the undisputed validity of the "no question" rule, the Eighth Circuit agreed with the Board that Woolworth could not discipline Withers for his insubordinate violation of the rule. When a lawful rule limits employee speech, it reasoned, the employer's right to enforce the rule must be balanced against employee rights (presumably the right to violate the rule). *Cf. NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). In misplaced reliance on its decision in *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972), it concluded that only "egregious" misconduct would justify discharge in these circumstances and that Withers' insubordination did not meet that standard.

The Eighth Circuit's holding severely limits the right of employers to control the activities of their employees during working time. This Court has long recognized that Section 7 does not grant employees the right to engage in organizational activities at all times and in all places, but the holding of the Eighth Circuit herein effectively does just that. To hold that employers may not impose discipline for violation of valid rules restricting employee conduct, absent egregious behavior, is to hold that an employer cannot manage its workplace in an orderly fashion.

Woolworth submits that this is an unintended and unwarranted extension of Sections 7 and 8(a)(1) of the Act. The proper test for determining whether discharge for violation of a rule restricting speech is proper is not the quality or degree of misconduct involved—whether bad, terrible, "egregious," or whatever—but, rather, whether the rule was valid, and if appropriate, whether a valid rule was applied in a discriminatory fashion. Where, as here, the validity of the rule is

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tablished practice and specific instructions of Mede, the highest ranking management representative headquartered in the distribution center. In this context, to quarrel with Respondent's description of Withers' conduct as a brazen act of insubordination, a phrase which aptly covers any refusal to yield to authority, is to deny what occurred." (A19-20)

undisputed, and discrimination is not alleged, the inquiry need not and should not go any further.

Certainly, as this Court has held, there must be an accommodation of both the "employees' undisputed right to self-organization and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-98 (1944). That balancing of rights, however, is relevant only to the question of whether a particular rule or restriction is valid, not to the question of when an admittedly valid rule may be enforced. Further, even when balancing is appropriate, it is between the employer's justification for the rule and the extent to which it infringes on the employees' right to organize. *See Hudgens v. NLRB,* 424 U.S. 507 (1976). *See also Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978). The nature or degree of violation is simply not involved.

Where, as here, the Board and the courts attempt to evaluate the degree of violation, they enter an area which to date has been exclusively within management's control: the determination of what conduct warrants what degree of discipline. This interference is contrary to this Court's holding in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), that, absent motivation violative of the Act, an employer has total control over its business practices, including policies concerning the tenure of employees, and may hire and fire at will for any reason or no reason at all. It is also contrary to the Eighth Circuit's own decision in *NLRB v. Prescott Industrial Products Co.,* 500 F.2d 6, 11 (8th Cir. 1974), that "the Act does not purport to give the Board any control over the employer's policies concerning tenure of employment, and his measures of discipline remain his own." *See also NLRB v. Ace Comb Co.,* 342 F.2d 841, 847 (8th Cir. 1965). The mere fact that misconduct occurs during the course of protected activity does not serve to abridge this right,[13] yet an obvious effect of the Eighth

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13 *See NLRB v. Mueller Brass Co.,* 509 F.2d 704 (5th Cir. 1975) ("If the specific employee happens not only to break a Company regulation but also to evince a pro-Union sentiment, that coincidence alone is not

Circuit decision herein is the curtailment of employers' right to terminate employees for rule violation and insubordination, indisputably valid bases for discipline or discharge. *See, e.g., NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696 (8th Cir. 1967).

Further, to adopt the "egregious" standard applied by the Eighth Circuit will produce anomalous results. This Court has held, for example, that an employer may lawfully prohibit solicitation by employees (including pro-union discussions) during working time. *See, e.g., NLRB v. United Steelworkers of America (Nutone, Inc.)*, 357 U.S. 357 (1958).[14] Under the rule of this case, however, such a rule could be enforced only with respect to "egregious" violations. The same should hold true with rules concerning distribution of literature or any other employee activity. But, there is absolutely no suggestion in this Court's prior decisions on solicitation and distribution that a valid rule can be enforced only with respect to egregious misconduct.

Similarly limited by the Eighth Circuit's decision is the free-speech right of employers to express their own views on unionization, within the confines of the Act. As this Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969), "an employer's free speech right to communicate his

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sufficient to destroy the just cause of his discharge or suspension"); *NLRB v. Soft Water Laundry, Inc.*, 346 F.2d 930, 934 (5th Cir. 1965) ("If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union . . . . If an employee is both inefficient [insubordinate] and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge"). Thus, the Board and court of appeals have contravened Section 10(c) of the Act, 29 U.S.C. § 160(c), which precludes a Board reinstatement or back-pay award involving an employee who has been terminated for cause.

14 Here, Mede's meeting was during working time and the employees, including Withers, were paid for the time spent at the meeting. It is illogical that an employee may be discharged for union solicitation in violation of a no-solicitation ban but an employer is not permitted to enforce a valid no-question rule at its own employee meeting. Obviously, a rule which cannot be enforced is a rule which effectively does not exist.

views to his employees is firmly established and cannot be infringed by a union or the Board." The sole restriction on that right is that "no threat of reprisal or force or promise of benefit be made." *See also* Section 8(c) of the Act, 29 U.S.C. § 158(c).

Finally, the court of appeals announced a new standard in the case at bar, a standard which abridges employer rights and represents a radical concept in labor-management relations never before articulated by any court. Thus, the circuit court held:

> Further, Withers' inability to receive a *meaningful response* from Mede concerning his complaint about the assignment of female employees after the first two employee meetings *tips the balance* in the present case in the other direction. Woolworth's failure to provide a *meaningful outlet* for the exercise of Withers' right to engage in concerted activity *weighs heavily against Woolworth.* (Emphasis added).[15]

The court of appeals decision, if permitted to stand, requires an employer that wishes to exercise its statutory free speech right granted under Section 8(c) of the Act, through the legitimate medium of lawful speeches to its employees assembled on company time and premises, to furnish any and all of its employees an instant right to respond by disruptive questions.[16] This rule will certainly impede the free expression of employer views since an employer will be powerless to

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15 This statement is misleading. Mede did answer Withers' previous questions; Withers simply did not like the answers.

16 Ironically, the decision in this case gives employees—and, by analogy, unions—a right to respond which was proposed in the Labor Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. (1977), but which was never enacted. Thus, proposed Section 6(b)(1)(A) of that bill would have required the Board to issue a rule to assure:

> '[T]hat if an employer or employer representative addresses the employees on its premises or during working time on issues relating to representation by a labor organization during a period of time that employees are seeking representation by a labor organization,

discipline or control its employees by enforcing its lawful rule prohibiting questions. Such a result is patently illogical.

Withers had numerous opportunities to express his views to employees rather than berate Mede at an assembled meeting of 200 employees on company time. He could have talked to employees and expressed his views on the plant premises during non-working time. He could have visited their homes or telephoned them. He could have sent them letters or passed out leaflets. He could have walked in front of the facility before and after work with a sign expressing his views. There is no logical reason why Woolworth must provide him an outlet to present his disruptive comments during working time and in its manager's meeting.[17] As this Court stated in *NLRB v. United Steelworkers of America (Nutone, Inc.), supra,* "[t]he Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it." 357 U.S. at 364. The same should be true for an individual employee.

In sum, the court of appeals holding that an employer may not discipline an employee for misconduct connected with protected activity unless it is "egregious" severely restricts the

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the employees shall be assured an equal opportunity to obtain in an equivalent manner information concerning such issues from such labor organization.

17 Board law limits an employer's ability to communicate with its employees during a union campaign. It cannot visit or telephone them at home. See, e.g., *Hurley Co.,* 130 N.L.R.B. 282, 283 n.4 (1961); *Peoria Plastic Co.,* 117 N.L.R.B. 545, 547 (1957). Nor can it attend a union meeting. See, e.g., *NLRB* v. *Aero Corp.,* 581 F.2d 511 (5th Cir. 1978), enforcing, 233 N.L.R.B. 401 (1977); *Federal Prescription Service, Inc.* v. *NLRB,* 496 F.2d 813 (8th Cir. 1974), *cert. denied,* 419 U.S. 1049 (1974); *Mountain Meats,* 236 N.L.R.B. 1481 (1978). The court of appeals decision herein deprives employers of the only remaining effective means of communicating their views on unionization—employee meetings on company time—by giving employees the right to interrupt and take over.

management and free-speech rights of employers, in radical departure from prior holdings of this Court. The holding that employees have a right to receive a "meaningful response" to their inquiries of management and that, if dissatisfied with the answers, they may not be disciplined for pursuing their individual inquiries in an insubordinate manner in violation of a valid company rule will simply create chaos in employer-employee relationships. For that reason,* this petition for a writ of *certiorari* should be granted and the decision of the Eighth Circuit reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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LAURENCE REICH,
ROSEMARY A. HALL,
On the Brief.

Dated: December 15, 1981

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1896

F. W. WOOLWORTH CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Submitted: June 16, 1981 Filed: July 31, 1981

Before:

LAY, *Chief Judge,* and STEPHENSON, *Circuit Judge,* and LARSON,* *Senior District Judge.*

* Earl R. Larson, United States Senior District Judge, District of Minnesota, sitting by designation.

LARSON, *Senior District Judge:*

This case began when an employee of F. W. Woolworth Co. (Woolworth), Eric Withers, filed an unfair labor practice charge with the National Labor Relations Board (Board) protesting his discharge by Woolworth. A Board ALJ subsequently decided that this discharge violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), and this decision was later affirmed by the Board. Woolworth filed a petition for review of the Board's decision and order with this Court and the Board followed with a cross-application for enforcement of its order.

Woolworth is a New York corporation that runs a nationwide chain of retail stores. Its merchandise is distributed to its stores from regional distribution centers, one of which is the Mid-Atlantic Distribution Center (MDAC) in Denver, Pennsylvania. MDAC has been the site of several union organizing campaigns, the most recent one in the spring of 1979. On May 25, 1979, a Board representation election was held and the employees voted against union representation.

During the 1979 campaign, Woolworth held three employee meetings on company time in the MDAC cafeteria to deliver speeches conveying its position on unionization. Employee attendance at these meetings was compulsory. No questions were allowed at these meetings although employees were told they could ask questions on the work floor after the meetings.

Eric Withers had been a vocal critic of Woolworth's failure to assign more female employees to the shipping department at MDAC. He viewed the assignment of only two female employees to the shipping department as insufficient and as representing favoritism towards male

employees. After the first two employee meetings, Withers asked General Manager John Mede why there were not more women in the shipping department and was told that work assignments were a management prerogative and was asked "who put you up to this?"

The final employee meeting was begun at 2:30 p.m. on May 24. It was necessary to conclude this meeting by 3:00 p.m. in order to comply with *Peerless Plywood,* 107 N.L.R.B. 427, 33 L.R.R.M. 1551 (1953), which prohibits such meetings within 24 hours of a representation election. When Mede began his speech, Withers interrupted by standing and stating that he wanted to ask a question. Mede told Withers to be seated and Withers sat down for a few minutes. After a few minutes Withers again stood up and again stated that he wanted to ask a question. He was again told to sit down but instead he asked Mede if this was to be another one-sided affair where Mede would "spoon feed" the employees and do all the talking and have the employees do all the listening. This second attempt to ask a question lasted a few minutes and then Withers sat down again. Mede completed the remainder of his speech before 3:00 p.m. After the meeting, on the same day, Withers was informed that he was suspended pending an investigation. Later that day Woolworth sent a mailgram to Withers informing him that he was being discharged for insubordination. The sole basis for the termination was his alleged misconduct at the May 24 meeting.

I. *Jurisdiction*

The jurisdiction of this Court is invoked pursuant to section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), since Woolworth maintains numerous

business facilities within the jurisdiction of this Court and thereby transacts business within this Circuit.[1] Although the alleged unfair labor practice occurred in Denver, Pennsylvania, within the jurisdiction of the Court of Appeals for the Third Circuit, Woolworth has obviously chosen this Circuit in order to rely on the decision in *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974).

II. *Concerted Activity*

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157,[2] grants employees the right to engage in "concerted activity" for their mutual aid and protection. Section 8(a)(1)[3] makes it an unfair labor practice for an employer to interfere with an employee's exercise of this right. Woolworth argues that the activity at issue here was not concerted since Withers acted alone. Activity is concerted, however, even where only one employee is in-

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1 Woolworth has taken advantage of the following provision in section 10(f):

> Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business.

2 Section 7 provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

3 Section 8(a)(1) provides:

> It shall be unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title.

volved if the employee is enlisting the support of fellow employees. *See NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977). By pressing for more female employees to be assigned to the shipping department, Withers was seeking to enlist the support of at least some of his fellow employees at MDAC.

The Board has held, and we agree, that an employee is engaged in concerted activity when he attempts to ask questions at a captive audience meeting, convened by management on the subject of unionization, unless the questions are pursuant to a scheme or plan to disrupt the meeting. *See Howell Metal Co.*, ____ N.L.R.B. ____, 102 L.R.R.M. 1031 (1980). Woolworth contends that the ALJ made a finding that Withers was engaged in individual, rather than concerted, activity. The finding, however, was that Withers had not taken part in a scheme or plan to disrupt the meeting.[4]

III. *The Unfair Labor Practice*

Where an employer discharges an employee in these circumstances, the Board must balance the employee's right to engage in concerted activity against the employer's right to maintain order and respect. This balancing permits some leeway for impulsive behavior on the part of the employee. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). The Board's performance of this balancing test, unless illogical or arbitrary, ought not to be disturbed. *Id.*

Woolworth argues that the present case is controlled by *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974), where an employer delivered a captive

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4 In *Prescott* this Court did not reach the question of whether the activity involved was concerted or individual. *See* 500 F.2d at 7.

audience speech to employees pointing out the disadvantages of unionization. At or about the end of the speech, an employee persisted in his attempt to ask a question despite requests by the employer to sit down as there was no question and answer period allowed. After the employer refused to entertain the question several times, the employee and some 20 or 25 fellow employees walked out of the meeting. The employee was subsequently discharged for insubordination.

In *Prescott* this Court adopted the balancing principles of *Thor Power Tool* and in the present case we find the Board's performance of this balancing test neither illogical nor arbitrary. Withers' behavior was impulsive; he sat down after his first attempt to ask a question and did not remain standing long following his second attempt. As noted in *Prescott:*

> The Board apparently is enunciating a general principle that insolvent, rough, and intimidating conduct cannot serve as a basis for discharge if that conduct is carried out in connection with the assertion of protected activity under § 7 of the Act and that unless such improper conduct, including threats, intimidations and acts adverse to the operation of the employer's business is "egregious," the same must be accepted as a normal and usual incident of labor-management relationships. 500 F.2d at 11 (quoting *NLRB v. Red Top, Inc.*, 455 F.2d 721, 728 (8th Cir. 1972)).

The conduct here certainly wasn't "egregious"; in fact, Mede was even able to complete his remarks before 3:00 p.m.

Prescott is distinguishable from the case before us in that in *Prescott* the employee and others walked out of

the meeting. The meeting in *Prescott*, and the meeting here, were held on company premises and on company time. Walking out of such a meeting, accompanied by 20 or 25 fellow employees, directly challenges management's right to maintain order and respect and tips the balance in favor of the employer. On the other hand, in Withers' case the reaction of fellow employees was negative, marked by cat calls and even profanity, urging him to sit down and shut up. Withers' interruptions were no threat to Woolworth's interest in maintaining discipline or respect. Further, Withers' inability to receive a meaningful response from Mede concerning his complaint about the assignment of female employees after the first two employee meetings tips the balance in the present case in the other direction. Woolworth's failure to provide a meaningful outlet for the exercise of Withers' right to engage in concerted activity weighs heavily against Woolworth.

Accordingly, Woolworth's petition for review and for the setting aside of the Board's decision and order is denied and the Board's order is enforced.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Decision and Order of the National Labor Relations Board, dated August 27, 1980

251 NLRB No. 152

FJT
D—6861
Denver, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 4—CA—10270

F. W. WOOLWORTH CO.

and

ERIC WITHERS, an Individual

DECISION AND ORDER

On May 6, 1980, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel also filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

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1 Respondent excepts to the Administrative Law Judge's conduct of the hearing and his failure to rule upon its motion for a hearing *de novo;* it also renews its motion for a hearing *de novo.* Respondent primarily alleges that the Administrative Law Judge committed prejudicial error by the following actions: (1) prejudging the issues; (2) assuming the role of advocate through improper examination of witnesses; (3) questioning the manner in which Respondent presented its defense; and (4) discounting the testimony of Respondent's witnesses on the basis of perceived irregularities in the sequestration of witnesses and the presence of Respondent's general manager at the hearing. After a careful consideration of the entire record, we are satisfied that Respondent's allegations are wholly without merit. In our view there is nothing in the record to suggest that the Administrative Law Judge prejudged the case or prejudiced Respondent by participating in the examination of witnesses. Indeed, it is the duty of the Administrative Law Judge under the Board's Rules and Regulations (Sec. 102.35) to inquire into the facts by examining and cross-examining witnesses. It is also the Administrative Law Judge's responsibility to limit or exclude irrelevant and repetitious evidence, which accounts for his remarks concerning Respondent's continued presentation of cumulative and conclusionary opinion testimony. As for the sequestration issue, the Administrative Law Judge merely observed that "appearances of irregularity" were raised by the fact that Respondent General Manager Mede, who was a central figure in the alleged unfair labor practices and was present during the entire hearing, was escorting Respondent's sequestered witnesses to and from the hearing room. The Administrative Law Judge asked Mede if he had spoken to witnesses and, satisfied with Mede's reply, did not find any violation of the sequestration order. We find that the Administrative Law Judge handled this matter properly and that there is no evidence that his resolutions of credibility or the inferences he drew were tainted by this incident. Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We also for the foregoing reasons deny Respondent's motion for a hearing *de novo.*

2 The Administrative Law Judge inadvertently failed to conform the notice with his recommended Order. We shall correct the notice accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, F. W. Woolworth Co., Denver, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. August 27, 1980

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

WE WILL offer Eric Withers immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered due to the discrimination practiced against him by paying him a sum equal to what

he would have earned, less any net interim earnings, plus interest.

F. W. WOOLWORTH CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green Jr. Federal Building, 600 Arch Street, Room 4400, Philadelphia, Pennsylvania 19106, Telephone 215—597—7643.

APPENDIX C

Decision of the Division of Judges, National Labor Relations Board, dated May 6, 1980

JD—268—80
Lancaster, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 4—CA—10270

F. W. WOOLWORTH CO.

and

ERIC WILLIAMS, An Individual

BARBARA J. FICK, ESQ. and ALAN A. SYMONETTE, ESQ., of Philadelphia, PA, *for the General Counsel.*

CHRISTOPHER J. HOEY, ESQ., of New York City, NY, and JOHN L. MEDE, of Denver, PA, *for the Respondent.*

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by the undersigned in Lancaster, Pennsylvania, on January 29 and 30, 1980, upon an original unfair labor practice charge filed on June 14, 1979, and a complaint issued on July 23, 1979, alleging that Respondent independently violated Section 8(a)(1) by coercively interrogating an employee regarding union activity, and by discharging on May 24, 1979, Eric Withers, for reasons proscribed by the Act. In its duly filed answer, Respondent denied that any unfair labor practices were committed. After the close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.[1]

Upon the entire record in this proceeding, and after consideration of the post-hearing briefs, and with the opportunity to observe directly the demeanor of the witnesses while testifying, it is hereby found as follows:

Findings of Fact

I. Jurisdiction

Respondent is a New York corporation engaged in the general sale of merchandise with a facility in Denver,

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1 Attached to Respondent's brief was a document entitled "Respondent's Motion for a Hearing De Novo." The error assigned therein relates to statements made by the undersigned concerning the sequestration order placed in effect at the hearing's outset. Respondent avers that "This motion is not lightly made . . ." and goes on to charge the undersigned of having committed ". . . substantial, prejudicial and reversible error." The motion expressly denied that the ". . . character and integrity of the Administrative Law Judge" are placed in issue. In this posture, it strikes as peculiar that a request for such relief would be addressed directly to the undersigned, rather than the appropriate reviewing authority.

Pennsylvania. In the course of said operations, Respondent, during the calendar year preceding issuance of the complaint, a representative period, derived gross revenues exceeding $500,000, and sold and shipped products, goods, and materials, valued in excess of $50,000 from its Denver facility directly to points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Teamsters Local Union No. 771 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

This proceeding involves alleged unfair labor practices attributed to the Respondent during the course of a union campaign with respect to a single employee, Eric Withers. Withers was alleged to have been the subject of unlawful interrogation of a few days prior to his discharge. Both are alleged to have violated Section 8(a)(1) of the Act.

Involved is Respondent's mid-Atlantic distribution center, an extensive facility of approximately 715,000 square feet. Operations commenced at that location in 1975, and at present the Center is manned by a blue collar work force of some 200. There is no history of union representation, but since 1975, these employees have been the subject of at least two, and possibly three, separate

campaigns by two different unions. The instant effort was waged by Local 771, Teamsters, and began in the spring of 1979, culminating in an election conducted on May 25, 1979, in which employees opted against union representation.

During the recent campaign, Respondent actively opposed the Union, and to further its view conducted three meetings, during working time, with attendance by its production employees compulsory. These meetings were held on May 11, 21 and 24, 1979.[2] John L. Mede the General Manager at the Denver facility, presided and delivered prepared antiunion speeches at each. All parties agree that in the course of the meeting held on May 24, the day before the election and prior to the 24-hour insulated period, Mede was interrupted twice by Withers, who pressed for the right to ask questions. There also is no dispute that it was this and conduct related thereto on the part of Withers, that provided the sole basis for his termination. Accordingly, the discharge issue turns upon the standards laid down by the Board in such cases as *Hicks Ponder Co.*, 168 NLRB 806, 815-17, and *Prescott Industrial Products Company,* 205 NLRB 51, enforcement denied 500 F.2d 6 (C.A. 8, 1974).

Withers was a dockworker in the shipping department. As to his involvement in the Union's campaign, the record is devoid of proof that Withers had declared his sentiment either for or against organization. At the same time, however, it appears that Withers labored under the frustration of management's failure to resolve what he regarded as a primary grievance. Thus, Respondent's production work force consisted of both male and female employees, all occupying a single employment classifica-

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2 Unless otherwise indicated all dates refer to 1979.

tion at a single rate of pay. Two female employees were assigned to the shipping department. As Withers saw it, this was not enough for in his view the work in the shipping department was more taxing physically than that in others areas and the assignment of insufficient females to that department was viewed by him as favoritism. Withers addressed his views in this regard to Mede on two occasions prior to the May 24 captive meeting.

It was Respondent's practice during the campaign, to preclude employees from asking questions in the course of its captive audience speeches. This policy was communicated to employees and I am convinced that Withers, prior to May 24, knew of its existence.[3] Under the policy, Mede and Assistant General Manager Tufano, instead of entertaining questions at the meetings, made themselves available in work areas allowing employees under those circumstances to raise questions. From my understanding of Tufano's testimony, the preference of management was to conduct these exchanges at an individual level, and any congregating of groups on those occasions was discouraged.

The allegation of interrogation arises from Withers' own resort to this procedure. Thus, following the captive meeting on May 11 he approached Mede and observed that in the latter's speech the issue of favoritism had been mentioned. Withers opined that he felt that there was favoritism on the job towards women in that, ". . . the

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[3] To the extent that Withers' testimony is inconsistent with this finding, it is discredited. See Respondent Exhibit 9(b) which I find to be the text of the speech delivered by Mede on May 11, and Respondent Exhibit 6, which is an item of prounion propaganda, dated May 22, 1979, which refers to Respondent's policy of denying employees the opportunity to have questions answered during the captive meetings. See also the testimony of Gary Grube, a witness for the General Counsel.

women were being paid the same as the men, but not working as hard as the men." When Mede pointed out that there were women assigned to the shipping department, Withers responded that those in shipping were "only tokens."

A second confrontation on this issue followed the speech delivered by Mede on May 21, after Withers informed his supervisor that he had a question he wished to address to the former. This was relayed to Mede, and he, together with Tufano, approached Withers while the latter was working in a trailer. Mede addressed Withers, stating that he understood that Withers had a question for him. Withers, who claimed to be startled by the sudden expression from his rear, "turned," waving his arm as he did so, loudly exclaiming "when the hell are you going to do something about getting women into the department?" Mede pointed out that the manning of departments is a mangement prerogative and such assignments are made on the basis of business need. Mede then pointed out that the complaint about sex discrimination had been a long standing one in the shipping department, dating back to "Day one" and asked Withers ". . . who put you up to this . . . did the boys put you up to this?"[4]

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4 Withers testified that when confronted by Mede he simply renewed the charge that men in the shipping department felt that they were being discriminated against because there were not many women in that department. He further testified that the inquiry in the course of this dialogue with Mede was as follows: "Who put you up to this? Was the Teamsters that did this?" I prefer the testimony of Tufano and Mede which seemed the more probable. Mede enjoyed an experienced hand with respect to labor-management matters, and as counsel for Respondent observed, Mede was not likely to associate the devisive sex discrimination issue with those raised by the Union during the campaign. Although I did not believe all the testimony of Mede and Tufano, and viewed Tufano, particularly, as tending to exaggerate in furtherance of Respondent's cause, Withers was far from impressive, and in this instance, the testimony of the former impressed me as the more reliable.

The above reference by Mede to ". . . the boys . . ." is alleged to constitute interrogation proscribed by Section 8(a)(1). The credited testimony does not substantiate this allegation. Taking account of the total facts and circumstances involved, including the background against which the inquiry was made, I am convinced that the focal point of this allegation related to a rhetorical question, posed in an argumentative vein, and one not likely to be construed as in quest of information relative to union or other forms of protected activity.

Concerning the discharge, as heretofore noted, on May 24, the day before the election, Mede conducted a so-called 24-hour meeting to further advance the Company's views concerning union organization. Mede spoke with the aid of a microphone and amplifier and as on earlier occasions read from a prepared speech, the lawful content of which is not challenged. Consistent with Respondent's policy, no employee had ever before attempted to ask a question in the course of these meetings. However, at the May 24th meeting, Withers insisted on being given the opportunity to ask questions, interrupting Mede twice for that pupose.[5] In any event, it appears that first interruption was rather mild and aborted. Thus, Withers rose to his feet, raised his hand, and stated "Excuse me, can I ask a question?" Mede told Withers to please sit down indicating that if Withers would give him a moment, Mede would inform as to how questions would be handled. Withers obliged and Mede continued with the

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5 Withers testified that he first thought to raise a question, after Mede had proceeded into the substance of his speech. To this extent his testimony conflicts with that of Assistant Manager Ballard, Mede, and Tufano, all of whom testified that the interruption occurred during or just after Mede's completion of his opening remarks. The conflict is immaterial and need not be resolved.

speech. Shortly thereafter, Withers again rose, stating in a loud voice that he would like to ask a question. He was told by Mede to sit down. Withers this time refused. He was told by Mede that he was out of order, but Withers persisted in his quest of recognition. A debate ensued accompanied by escalating temperament on the part of both. Finally, Withers was told by Mede that he was free to leave if he did not wish to remain. When this proved unavailing, Mede called for security guards to remove Withers. At this point Assistant Manager Ballard approached Withers and eventually convinced him to be seated. Mede then proceeded with the speech to its conclusion. Although Withers was permitted to remain, after receding to his seat, he continued to mumble under his breath, making a loud comment at the conclusion of the speech.

After that meeting, Withers returned to his work station. Later that day he was summoned to Tufano's office where he was informed that he was suspended pending an investigation, with the probability that he would be discharged. The next day, Withers was informed of his termination.

Under the precedent, Respondent's attempt to further its antiunion campaign by conducting a captive audience meeting and by declaring that no questions would be answered in the course thereof, did not amount to an unfair labor practice.[6] And Withers' insistence on asking a question was an act disobedient both to established practice and specific instructions of Mede, the highest ranking management representative headquartered in the distribution center. In this context, to quarrel with Respondent's description of Withers' conduct as a brazen

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6 See, e.g., *Livingston Shirt Corp.*, 107 NLRB 400.

act of insubordination, a phrase which aptly covers any refusal to yield to authority, is to deny what occurred. However, reconciliation of this issue does not turn on semantics. Section 7 of the Act places no gloss upon an employer's absolute right to set the rules of the place of work and to enforce work obligations on worktime with discipline. However, an employer attempt to impose his will as to how a debate over unionization will be waged, though within its rights, may not necessarily be enforced in the same absolute fashion as the former.

The turbulence inherent in union activity arises from rivalry and division likely to provoke even the docile to petulant behavior. For that reason—whether in the context of an economic strike,[7] grievance presentation[8] or organizational activity[9]—emotional excess manifested by employees in resisting management is not committed under this law to the absolute judgment of employers. Indeed, Congressional guarantees embodied in Section 7 of the Act would be jeopardized if every act of disrespect or insubordination emerging from a protected dispute which divides management from its workforce, renders the employee involved as fair game for discipline.

The misconduct in issue here arose in a context, which under established Board policy, constituted activity protected by Section 7 of the Act.[10] Accordingly, the conduct

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7 See *Ohio Power Company*, 216 NLRB 348, 354, and cases cited at fn. 7 thereof. See also *N.L.R.B.* v. *Thayer Co.*, 213 F.2d 748 (C.A. 1, 1954), for the principles governing unfair labor practice strikers.

8 *N.L.R.B.* v. *Thor Power Tool Company*, 351 F.2d 584, 587 (C.A. 7, 1965).

9 *Liberty Nursing Home, Inc.*, 245 NLRB No. 153. See also *N.L.R.B.* v. *Illinois Tool Works*, 153 F.2d 811 (C.A. 7, 1946).

10 *Howell Metal Co.*, 243 NLRB No. 178; *Prescott Industrial Products, supra.*

of Withers and the discipline imposed involves a conflict between the employer's right to maintain discipline and respect on the one hand, the the employee's right to implement statutory rights on the other. The accomodation was spelled out by the Seventh Circuit Court of Appeals in the *Thor Power Tool* case, supra, 351 F.2d at p. 587:

> The employee's right to engage in concerted activity may permit some lee way for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Initially the responsibility to draw the line between these conflicting rights rest with the Board, and its determinations unless illogical or arbitrary ought not be disturbed.

In factual circumstances somewhat similar to that involved here the Board has taken cognizance of the foregoing, and ". . . held consistently that discipline for having the temerity to ask questions' during such meetings violates the Act. . . ."[11] However, that view is not without exception, and under the precedent, the balance tips in favor of employer interests where the disruption caused by the employee involves "violent conduct, improper motive, or bad faith."[12] The discipline will also be upheld where such conduct is part of a ". . . planned course of conduct to disrupt the captive audience speeches in an attempt to turn the meetings into a union forum."[13] The

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11 *Howell Metal Company*, 243 NLRB No. 178, p.4.

12 See *J.P. Stevens & Company, Inc.*, 219 NLRB 850 (1975).

13 See *J.P. Stevens & Company, Inc., supra*, p. 850; and *Hicks Ponder Company*, 168 NLRB 806. Cf. *Howell Metal Co., supra*. This limitation on employee misconduct operates to preserve "an employer's free speech right to communicate his views . . . [which] . . . is firmly established and which cannot be infringed upon by a union or the Board." *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 617.

final circumstance in which discipline is to be upheld as lawful focuses upon the degree of misconduct on the part of the employee, an evaluation controlled by the following:

> A line exists beyond which an employee may not with impunity go, but that line must be drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in "a moment of animal exuberance" . . . or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service.[14]

With these considerations in mind, it is first noted, that the evidence does not support a conclusion that Withers' disruption of the meeting was pursuant to conspiritorial or independent predesign to prevent Mede from delivering the entirety of his message.[15] It does not appear that a single employee supported Withers effort that led to his discharge. Instead, the reaction of fellow employees was negative, marked by "cat calls" and even profanity, in their urging him to sit down and shut up.

The appropriate inference arising on this record is to the effect that Withers, dissatisfied with responses from

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14 *The Bettcher Manufacturing Corporation*, 76 NLRB 526. See *Prescott Industrial Products Co.*, 215 NLRB 51, 52, enforcement denied, 500 F.2d (C.A. 8, 1974). See, however, *Masonelan International, Inc.*, 223 NLRB 965, 966, including fn. 3.

15 James E. Michener, an employee called by the Respondent, denied that Withers had told him that he was going to ask questions at the meeting. Respondent's Exhibit 7 is an *unsworn* statement taken of Michener by Respondent's counsel which recites the contrary. However, Respondent's attempts to obtain affirmation of the truth thereof fell short of subjecting the content thereof to the oath. As such, its status remains unsworn, and the declarations therein do not constitute competent proof.

Mede during private interviews—the only forum through which management was willing to respond to employee inquiries—wished an airing in the presence of fellow employees. All temperament manifested by Withers was incidental to his somewhat continuous and unsuccessful effort to ask a question. Undoubtedly he was the provocateur and Mede was impelled by his conduct to join in an emotional exchange of the type of be expected of two determined individuals, each seeking what the other would not give. Undoubtedly anger escalated on the part of both until the deadlock was broken.[16] Yet, not a shred of evidence was offered to suggest that Withers resorted to profanity, or threats, nor was he shown to have used language of an inciteful nature.[17] Despite Withers' mut-

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16 Considerable effort was made on behalf of the Respondent to elicit opinion testimony as to the relative demeanor of Withers and Mede during their confrontation. Withers was described as cross, rather loud, disrespectful, out of control, angry, upset, rumbling, mumbling, grumbling, surly, ugly, very determined, arrogant, rude, nasty and flushed. The descriptive testimony applied to Mede, however, was hardly a model of consistency. For Mede was variously depicted as showing a demeanor ranging from "controlled anger" and an authoritative posture to "polite" and "clam" throughout. Confessedly, a basic mistrust is held by the undersigned for opinion evidence from lay persons in such a context. While that involved here was in minor instances plainly biased (See for example, the testimony of Helen Harding) the characterizations assigned would depend on perspectives, and one's own definition of the terms related. Many of the witnesses who offered such testimony were rank-and-file employees, called to the stand in the presence of their boss, Mr. Mede, to offer testimony in a proceeding in which he was named as the sole perpetrator of unfair labor practices. While the bulk of the characterizations were perhaps honestly maintained the danger is great that they were distorted by the authoritative status in which Mede would necessarily be held, coupled with the declarant's own idea as to what should be expected of Withers as an employee. Nonetheless, with the exception of such subjective characterizations as disrespectful, arrogant, surly, ugly, rude, and nasty, the evaluations offered through these witnesses probably represented an acceptable analysis of what they perceived.

17 Some ten witnesses were called by Respondent to afford their accounting as to what transpired at the May 24 captive meeting. This

terings after he sat down, Mede was able to continue the speech[18] and to conclude it within the time frame permitted by the Board's *Peerless Plywood* rule.[19]

On balance, I am convinced that Withers conduct, though having provoked a confrontation with Respondent's chief management functionary at the Denver facility, was confined to expressions of temperament not atypical of what might be expected when employee confronts manager in the heat of a union campaign. Withers, within limits, had the right to openly protest the gag imposed on employee participation during the propaganda sessions, and the credible evidence on this record fails to substantiate that he, though perhaps carried away, was guilty of the degree of misconduct sufficient to remove the protective mantle of Section 7 on those

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testimony ranged from the believable to the obviously biased, and consisted in the main of opinionated testimony. None of this group impressed as having a clear recollection of statements made by Withers in the course of the confrontation with Mede. The only name calling attributed to Withers, however, emerges from the testimony of certain of these witnesses to the effect that Mede was called a "dictator". Given the limited capacity for recollection of these witnesses, it is entirely possible that this did not occur, but that confusion resulted from a statement in the prepared speech delivered by Mede, as follows: "In the past few days I have been called smooth talking, a little dictator. . . ." See Respondent Exhibit 9(c). Although I reject this testimony and find no credible evidence that Withers deferred to name calling, I am inclined to believe that Withers did argue that Mede preferred to "spoon feed" the employees, charged that this would be another session in which Mede would do all the talking and the employees would do all the listening, and referred to the meeting as a "one-sided affair".

18 After Withers sat down, he continued to mutter under his breath but at a level which did not prevent Mede from completing his speech. The testimony of Tufano that these mutterings were in the nature of "cat calls" is discredited, since apparently at odds with testimony of other of Respondent's witnesses to the effect that Withers continued to mumble under his breath and really low.

19 107 NLRB 427.

presents. Withers' conduct rendered him no more fair game for discharge under this Act than would have been the case had he been instructed to forego any other Section 7 right and refused but without impeding management from carrying forth its legitimate objectives. I find that by suspending and then discharging Withers because of his conduct at the captive audience speech, Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by suspending, discharging, and refusing to reinstate Eric Withers on and after May 24, 1979, because he engaged in activity protected by Section 7 of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice having an effect upon commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1) by suspending and hereafter discharging Eric Withers, I shall recommend that Respondent offer him immediate and full reinstatement to his former job, or, if that job no

longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from May 24, 1979, to the date of a bona fide offer of reinstatement, less net interim earnings during such a period. Backpay shall be computed on a quarterly basis as prescribed in *F.W. Woolworth Company,* 90 NLRB 289 (1950). Interest thereon shall be computed in accordance with *Florida Steel Corporation,* 231 NLRB 651 (1977).[20]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[21]

ORDER

The Respondent, F.W. Woolworth Company, Denver, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of

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20 See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

21 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

their employment in order to discourage them from engaging in activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Eric Withers immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the unlawful discrimination against him in the manner set forth in the section of the decision entitled "The Remedy".

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under terms of this recommended Order.

(c) Post at its place of business in Denver, Pennsylvania, copies of the attached notice marked "Appendix."[22] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted immedi-

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22 In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ately upon receipt thereof and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that, except as herein specifically found, the allegations of the complaint is hereby dismissed.

Dated, Washington, D.C. May 6, 1980

JOEL A. HARMATZ

Joel A. Harmatz
Administrative Law Judge

APPENDIX D

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1896

September Term, 1980

F. W. WOOLWORTH CO.,

Petitioner,

—vs.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

On July 31, 1981, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that F. W. Woolworth Co., its officers, agents, successors, and assigns, abide by and perform the directions in said order.

Clerk, United States Court of Appeals for the Eighth Circuit.

FILED: July 31, 1981

Order entered in accordance with opinion

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, 8th Circuit

APPENDIX E

Order of the United States Court of Appeals Denying Petition for Rehearing and Suggestion of Rehearing *en banc*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1896

September Term, 1980

F. W. WOOLWORTH CO.,

Petitioner,

—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

The Court, having considered petitioner's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions en banc denied.

September 16, 1981

Opposition

Office - Supreme Court, U.S.
FILED
FEB 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1127

In the Supreme Court of the United States

OCTOBER TERM, 1981

F.W. WOOLWORTH CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) by discharging Eric Withers for attempting to ask a question at a meeting held to convey petitioner's views on unionization to its employees.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 5

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Coors Container Co. v. *NLRB*, 628 F. 2d 1283 6

Crown Central Petroleum Corp. v. *NLRB*, 430 F. 2d 724 6

Howell Metal Co., 243 N.L.R.B. 1136 ..... 3, 5

J.P. Stevens & Co. v. *NLRB*, 547 F. 2d 792 6

NLRB v. *Prescott Industrial Products Co.*, 500 F. 2d 6 6

NLRB v. *Thor Power Tool Co.*, 351 F. 2d 584 ..... 4, 6

NLRB v. *Washington Aluminum Co.*, 370 U.S. 9 6

Prescott Industrial Products Co., 205 N.L.R.B. 51, enforcement denied, 500 F. 2d 6 5

Page

Cases—Continued:

Trustees of Boston University v. *NLRB*,
548 F. 2d 391 6

United States Postal Service v. *NLRB*,
652 F. 2d 409 6

Statute:

National Labor Relations Act, 29 U.S.C.
151 *et seq.* 1

Section 7, 29 U.S.C. 157 ..... 3, 5
Section 8(a)(1), 29 U.S.C. 158(a)(1) 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1127

F.W. WOOLWORTH CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-7a) is reported at 655 F. 2d 151. The decision and order of the National Labor Relations Board (Pet. App. 8a-28a) are reported at 251 N.L.R.B. 1111.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a-30a) was entered on July 31, 1981, and a timely petition for rehearing was denied on September 16, 1981. The petition for a writ of certiorari was filed on December 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. During a union organization campaign at petitioner's Mid-Atlantic Distribution Center (MADC), petitioner held three employee meetings on company time in the MADC cafeteria to deliver speeches conveying its position on unionization. Attendance at these meetings was compulsory, and employees were not allowed to ask questions during the meetings, although they were told they could ask questions on the work floor after the meetings. (Pet. App. 15a-16a.)

Eric Withers, an employee in the MADC shipping department, had on several occasions criticized petitioner's failure to assign more than two female employees to the shipping department. After both the first and the second meeting, Withers met with MADC General Manager John Mede on the work floor, and asked why there were not more women assigned to the shipping department. On one occasion, Mede told Withers that work assignments were a management prerogative and asked, "who put you up to this?" Withers responded that the men in the shipping department felt they were being discriminated against. (Pet. App. 15a-17a.)

The third meeting was held on May 24. When General Manager Mede began his speech, Withers stood and politely asked if he might ask a question. Mede asked Withers to be seated, indicating that he intended to explain how questions would be entertained. Withers sat down. Mede continued his speech, and after a few minutes, Withers again stood up and asked if he could ask a question. Mede told Withers to sit down. This time, however, Withers remained standing and asked Mede if this meeting was going to be another "one-sided affair" where Mede would "spoon-feed" the employees and do all the talking while the employees would do all the listening. Although only one or two minutes elapsed during Withers' second attempt to ask

a question, the exchange between him and Mede apparently became rather heated. After the exchange, Withers again took his seat, and Mede then completed his speech. (Pet. App. 3a-19a.)

After the meeting, Withers was informed that he was suspended pending an investigation. Later that day, petitioner sent Withers a mailgram informing him that he had been discharged because of his conduct at the May 24 meeting. (Pet. App. 19a.)

2. Adopting the decision of the administrative law judge, the Board concluded that Withers' attempt to ask questions during the May 24 employee meeting was protected conduct under Section 7 of the Act (29 U.S.C. 157), for which he could not be disciplined under the circumstances of this case.

Although acknowledging the employer's right to attempt to control the debate over unionization (Pet. App. 20a), the law judge explained (*ibid.*):

> The turbulence inherent in union activity arises from rivalry and division likely to provoke even the docile to petulant behavior. For that reason—whether in the context of an economic strike, grievance presentation or organizational activity—emotional excess manifested by employees in resisting management is not committed under this law to the absolute judgment of employers. Indeed, Congressional guarantees embodied in Section 7 of the Act would be jeopardized if every act of disrespect or insubordination emerging from a protected dispute which divides management from its workforce, renders the employee involved as fair game for discipline. [Footnotes omitted.]

Citing *Howell Metal Co.*, 243 N.L.R.B. 1136 (1979), the law judge further noted that the Board had consistently held that discipline against employees who ask questions during

compulsory employee meetings on unionization may be imposed only where "the disruption caused by the employee involves 'violent conduct, improper motive, or bad faith' . . . [or] is part of a '. . . planned course of conduct to disrupt the captive audience speeches in an attempt to turn the meetings into a union forum' " (Pet. App. 21a; footnotes omitted). Since "the evidence [did] not support a conclusion that Withers' disruption of the meeting was pursuant to conspiratorial or independent predesign to prevent Mede from delivering the entirety of his message" (Pet. App. 22a), the law judge inferred "that Withers, dissatisfied with responses from Mede during private interviews—the only forum through which management was willing to respond to employee inquiries—wished an airing in the presence of fellow employees" (Pet. App. 22a-23a).

3. The court of appeals upheld the Board's finding that the suspension and discharge of Withers violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)), and enforced its order. Initially, the Court rejected petitioner's claim that Withers was not engaged in concerted activity because he acted alone in asking questions (Pet. App. 4a-5a):

> Activity is concerted, however, even where only one employee is involved if the employee is enlisting the support of fellow employees. See *NLRB* v. *Sencore, Inc.*, 558 F. 2d 433, 434 (8th Cir. 1977). By pressing for more female employees to be assigned to the shipping department, Withers was seeking to enlist the support of at least some of his fellow employees at MADC.

Further, citing *NLRB* v. *Thor Power Tool Co.*, 351 F. 2d 584 (7th Cir. 1965), the court of appeals concluded that the Board had properly balanced the competing considerations between "the employer's right to maintain order and respect" and "the employee's right to engage in concerted activity" (Pet. App. 5a). The court specifically noted that

Withers' conduct was impulsive and resulted from petitioner's refusal to give meaningful responses to his inquiries in private interviews, and that his conduct was not a threat to petitioner's interest in maintaining discipline or respect (Pet. App. 6a-7a).

ARGUMENT

1. The first issue presented in the petition (Pet. 8)—whether the court of appeals properly adopted "a rule of 'constructive concerted activity' that an individual employee, acting alone and without any ostensible aim of enlisting the support of his co-workers" is engaged in concerted activity within the meaning of Section 7 of the Act—is not presented in this case. Petitioner concedes (Pet. 9) that activity is properly considered "concerted" if "it is engaged in by several employees or engaged in by a single employee 'looking toward' or trying to induce group action." The court of appeals expressly found that Withers' activity fell within the latter category without reference to the constructive concerted activity doctrine. Thus the court found, "[b]y pressing for more female employees to be assigned to the shipping department, Withers was seeking to enlist the support of at least some of his fellow employees at MADC" (Pet. App. 5a). Moreover, by attempting to ask questions at the captive audience meeting, Withers sought a public airing of that issue, which petitioner had refused to discuss in private meetings. See, *e.g.*, *Howell Metal Co.*, 243 N.L.R.B. 1136 (1979); *Prescott Industrial Products Co.*, 205 N.L.R.B. 51 (1973), enforcement denied, 500 F. 2d 6 (8th Cir. 1974).

2. There is no merit in petitioner's additional contention (Pet. 16-22) that the Board improperly applied a balancing test here because "absent motivation violative of the Act" (Pet. 18), the employer had an absolute right to discharge employees who violated its rule against asking questions

during the captive audience sessions.[1] As this Court noted in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962), while an employer has a right to discharge employees for "cause," that does not "mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects" merely because the employer has a rule that prohibits the activity at issue.

The balancing test suggested in *Thor Power Tools, supra,* and employed by the Board and the court of appeals here, has been uniformly approved by the courts of appeals. See, *e.g., NLRB* v. *Prescott Industrial Products Co.*, 500 F. 2d 6, 10 (8th Cir. 1974); *J.P. Stevens & Co.* v. *NLRB*, 547 F. 2d 792, 794 (4th Cir. 1976); *Crown Central Petroleum Corp.* v. *NLRB*, 430 F. 2d 724, 729-731 (5th Cir. 1970); *United States Postal Service* v. *NLRB*, 652 F. 2d 409, 412 (5th Cir. 1981); see also *Coors Container Co.* v. *NLRB*, 628 F. 2d 1283, 1288 (10th Cir. 1980); *Trustees of Boston University* v. *NLRB*, 548 F. 2d 391, 393 (1st Cir. 1977). The only question actually presented by this aspect of the case is whether the Board properly balanced the competing interests here. As the court of appeals noted (Pet. App. 5a), the balance struck by the Board is entitled to enforcement unless "illogical or arbitrary." The court's conclusion that the Board's judgment was neither illogical nor arbitrary is plainly correct and, in any event, turns on the facts of this case. It therefore raises no issue warranting review by this Court.[2]

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[1] Petitioner's analogy (Pet. 19) to the right of an employer to prohibit union solicitation by employees during work time, is unpersuasive. As the law judge noted, (see page 3), this case does not involve an employer's imposition of rules which regulate behavior during work time, but rather an attempt to impose his will as to how a debate over unionization will be waged * * *."

[2] Petitioner's contention (Pet. 20-21 & n.17) that the court of appeals' decision gives employees "the right to interrupt and take over" captive

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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audience meetings is also wide of the mark. The court of appeals specifically noted that an employee is not entitled to the protection of Section 7 if he asks questions as part of a scheme or plan to disrupt the meeting (Pet. App. 5a). The decision here only precludes an employer from disciplining an employee who does no more than attempt to ask a question; the employer is not required to tolerate a disruption. Contrary to petitioner's assertion (Pet. 20-21), the court of appeals did not hold that an employer is always required to provide a "meaningful response" to an employee's questions. Petitioner's failure to respond meaningfully to Wither's questions was only one of the factors that the court considered in determining that Withers' conduct was protected activity.